(4) 88-1378

No. A-469

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

October Term, 1988

FRANK MCNEIL, et al.,

Petitioners,

v.

SPRINGFIELD PARK DISTRICT and SPRINGFIELD SCHOOL DISTRICT NO. 186,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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LIST OF PARTIES

The parties in this Court are as follows:

Petitioners: Frank McNeil, William H. Washington, Sr., Rudolph V. Davenport, Archie Lawrence, and Howard Veal, Sr.

Respondents: Springfield Park District and Springfield School District No. 186.

Springfield School District No. 186 has a continuing interest in this case and should be listed as a Respondent contrary to the incorrect claim of the Petitioners that the case is moot. The Petitioners' claim is discussed in the body of this brief.

TABLE OF CONTENTS

Page

LIST OF PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 5

TABLE OF AUTHORITIES

Cases *Page*

Bumpus v. Clark, 702 F.2d 826 (9th Cir. 1983) 3

In Re Ghandtchi, 705 F.2d 1315 (11th Cir. 1983) 3

United States v. Munsingwear, 340 U.S. 36, 40 (1950) 3

Statute

ILL. REV. STAT. ch. 122, ¶9-22 (1987) 2

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STATEMENT OF THE CASE

The Petitioners' Statement of the Case is inaccurate insofar as they claim (Footnote 1, page 3) that this case is moot with respect to Springfield School District No. 186 ("District"). It is true that on November 8, 1988, four months after the Seventh Circuit affirmed the District Court's summary judgment in favor of *both* the Springfield Park District and the Springfield School District No. 186, voters in the school district approved a

referendum under the Illinois School Code[1] to henceforth elect school board members from single-member districts. This change, however, did not moot the case with respect to the District.

The Petitioners have failed to inform the Court of the fact that, on December 7, 1988, they filed before the Seventh Circuit a Motion to Recall Mandate and Dismiss this Cause as Moot. A copy of that Motion is attached as Appendix A. The District responded on December 21, 1988. A copy of that response is attached as Appendix B. On February 13, 1989, the Seventh Circuit issued an order denying the Petitioners' Motion. This order was issued four days before the Petitioners filed their Petition for a Writ of Certiorari. We attach a copy of the court's Order as Appendix C. Contrary to Supreme Court Rule 21.1(k)(i) and (ii), which requires Petitioners to append copies of any orders in this or companion cases that were rendered by the court whose decision the petitioners seek to have reviewed, the Petitioners failed to inform the Court of this order or to append a copy to their petition.

SUMMARY OF ARGUMENT

Contrary to the claim of the Petitioners, this case is not moot with respect to Springfield School District No. 186. Although it is true that a referendum occurred that changed the election system in the District from at-large representation to single-member districts, the change was made independent of the Petitioners' lawsuit, does not achieve the result they sought in

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[1] Ch. 122, ¶9-22 provides in pertinent part, as follows:

> A school board may, on its own motion, or shall, upon the petition of the lesser of 2,500 or 5% of the voters registered in the district, order submitted to the voters of the district at a regular school election or at the general election, the proposition for the election of board members by school board district rather than at large, and such proposition shall thereupon be certified by the secretary of the board for submission. If the proposition is approved by a majority of those voting on the proposition, the board shall divide the school district into 7 school board districts, each of which must be compact and contiguous and substantially equal in population to each other district.

ILL. REV. STAT. ch. 122, ¶9-22 (1987)

that lawsuit and does not prevent the District Court from granting the relief requested. Therefore, this case is not moot with respect to the District.

ARGUMENT

This Brief is directed solely to the Petitioners' claim that Springfield School District No. 186 is no longer a party to this case because the portion of the case that applied to the District is moot. For the reasons discussed below, this claim is incorrect. The Petitioners have already made this claim to the Seventh Circuit which rejected it. Rather than acknowledging that denial and the precedent which supports it, the Petitioners seek to accomplish the result explicitly rejected by Seventh Circuit by indirection in this Court. A sentence in their List of Parties and a footnote in their Statement of the Case is not the proper place or manner to assert that a case has become moot, especially when the same claim has already been litigated and rejected in the court below.

Here, as in the Seventh Circuit, the Petitioners misconceive the doctrine of mootness. As this Court has explained, the purpose of declaring a case moot is that it:

> clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.

United States v. Munsingwear, 340 U.S. 36, 40 (1950). Thus, a case may be declared moot if an event occurs prior to appeal that makes it impossible for relief to be granted if the appellate court reverses the court below. *See, e.g. In Re Ghandtchi,* 705 F.2d 1315 (11th Cir. 1983) (issue of bail pending an extradition hearing became moot when the hearing was held and the individual was taken into custody pending extradition); and *Bumpus v. Clark,* 702 F.2d 826 (9th Cir. 1983) (procedural questions concerning closing of a nursing home became moot when the home closed while the appeal was pending). Here, nothing has occurred that would prevent a court from granting the relief requested if the law required it and nothing has occurred which suggests that the path should be cleared for relitigation of this meritless claim.

The Petitioners' claim that the referendum requiring the District to adopt a single district election plan accomplished the goal of their lawsuit is incorrect. The goal of their lawsuit was to prove that the District's at-large system diluted the voting rights of black voters.

The Petitioners did not achieve their goal. As a result of the School Code referendum on November 8, the Board must develop a redistricting plan but the prior decisions in this case establish that, on the basis of current demographic information, it is impossible to create a district with a majority black voting age population and the Board has no legal obligation to create a district with a majority black total population. It is speculative at best for the Petitioners to assume that the redistricting plan adopted by the Board will be the same as or similar to the one they hoped to achieve through this lawsuit.

At the time the Seventh Circuit rendered its judgment in this case, all the required elements of justiciability were present. Accordingly, the judgment of the Seventh Circuit that the Petitioners could not maintain a Voting Rights Act claim against the School District remains binding upon them. All elements of justiciability continue to be present.

Apparently, the Petitioners here no longer wish to pursue their action against the School Board. While they are entitled to abandon their claim, as a matter of law, their loss of interest does not moot the prior judgment nor does it remove the School Board as a party to their appeal.

The District waives its right to file a response on the substantive questions presented by the Petition. However, the District will file a response if requested by the Court, and it stands on its right to fully participate in proceedings before the Court if the Court grants the Petition.

CONCLUSION

For the foregoing reasons, the Petitioners' claim that this case is moot with respect to the Springfield School District No. 186 is incorrect, and the District should be included as a Respondent in the case.

Respectfully submitted,

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APPENDIX

APPENDIX - A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 87-2478

FRANK McNEIL, et al., individually and as representative of a certified class,
Plaintiffs-Appellants,

vs.

SPRINGFIELD PARK DISTRICT and SPRINGFIELD SCHOOL DISTRICT NO. 186,
Defendant-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Springfield Division

Case Nos. 87 C 3017 and 87 C 3016

Honorable **Richard Mills** Judge Presiding

MOTION TO RECALL MANDATE AND TO DISMISS THIS CAUSE AS MOOT

NOW COME Plaintiffs, Frank McNeil, et al, by and through their attorneys, and ask this court to recall its mandate, to vacate it decision in Case No. 87-3017 (District Court Case Number), and to remand the school district case to the district court with directions to vacate its decision and to dismiss this cause for mootness. In support of this motion, plaintiffs state as follows:

1. This court issued its mandate on September 21, 1988, affirming the district court's grant of summary judgment to defendants in this cause in both the Springfield Park District and School District cases.

2. Pursuant to 28 U.S.C. Sec. 2101(c) and Supreme Court Rule 20.2, plaintiffs have 90 days from September 21 in which to file a petition for writ of certiorari. In the park district case, plaintiffs will timely file a petition for a writ of certiorari.

3. Plaintiffs intended to file a petition for a writ of certiorari in the school district case as well; however, further review of this case is unnecessary and imprudent, because a referendum passed by the voters on November 8, 1988, has mooted issues in the school district lawsuit.

4. On November 8, a referendum was passed in the school district, which provides that the school district will henceforth elect its representatives by district, rather than at-large. This is the relief which plaintiffs have sought to obtain in this lawsuit. The election results were certified to the school district on November 10, 1988.

5. Plaintiffs wish to separate the school district case from the park district case in order to clarify the record which will be presented to the United States Supreme Court.

6. Furthermore, Plaintiffs represent to the court that the lawsuit was a substantial factor and a significant catalyst in the passage of the November referendum. Accordingly, despite this court's adverse decision, plaintiffs assert that, under the law, they are "prevailing parties" for purposes of an award of attorneys' fees under 42 U.S.C. Sec. 1983(1)(e).

7. Despite the adverse decision by this court, plaintiffs had, and until the November referendum, continued to have a colorable claim of a Voting Rights Act violation. Indeed, this court acknowledged in its decision that plaintiffs possibly had a meritorious claim of vote dilution, *see* 851 F.2d at 942-943, but applied a per se rule of a majority voting age population requirement which was found to bar plaintiffs suit.

8. Further review of this court's decision may have been available to plaintiffs, except for the November referendum, and plaintiffs will seek such review in the park district case. Plaintiffs' argument was and still is a colorable one, and plaintiffs are prepared to substantiate their assertion that their lawsuit was a substantial factor in the passage of the referendum.

9. Accordingly, plaintiffs ask this court to recall its mandate and to remand the cause to the district court with directions that the district court vacate its decision and dismiss the case as moot. Plaintiffs further ask this court either to rule as a matter

of law that plaintiffs are the prevailing parties for purposes of the fee award, or to direct the district court to make a determination as to whether plaintiffs are the prevailing parties and for further proceedings consistent with its opinion.

WHEREFORE, for the foregoing reasons, plaintiffs ask this court to recall its mandate, to vacate its decision, and to remand this cause to the district court with directions to vacate its opinion as moot.

Respectfully submitted,

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APPENDIX - B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 87-2478

FRANK McNEIL, et al.,
Plaintiffs-Appellants,

v.

SPRINGFIELD PARK DISTRICT AND SPRINGFIELD SCHOOL DISTRICT NO. 186,
Defendant-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Springfield Division

Case Nos. 87 C 3017 and 87 C 3016

Honorable **Richard Mills** Judge Presiding.

RESPONSE OF BOARD OF EDUCATION TO MOTION TO RECALL MANDATE AND DISMISS THIS CAUSE AS MOOT

The Plaintiffs' Motion to Recall Mandate and to Dismiss this Cause as Moot misconstrues the doctrine of mootness, and their effort to have themselves declared the prevailing party is directly contrary to and in disregard of the law of this Circuit. Accordingly, the Board of Education of Springfield School District 186 asks that the Plaintiffs' motion be denied and that the Board be awarded its attorneys' fees and costs of responding to the motion under Appellate Rule 38 and the Voting Rights Act.

A. The History of the Case

A brief review of the record facts of this case demonstrates that the case is not moot and that the Plaintiffs did not prevail. The Plaintiffs, Frank McNeil, et al, represent a class of all black voters residing within Springfield School District 186 ("District").

They brought this action under the Voting Rights Act, 42 U.S.C. §1973 (1982), against the Board of Education of Springfield School District 186 ("Board") on January 20, 1987 claiming that the at-large system of electing Board members unlawfully diluted black voting strength. In March, 1987, they filed an amended complaint in which they asked the court to " . . . divide the park and school districts into seven single-member districts, one of which would have a black majority population." 851 F.2d 937, 939 (7th Cir. 1988.).[1]

On June 3, 1987, the Board moved for summary judgment. The District Court granted the Board's motion on August 13, 1987 on the ground that the plaintiffs failed to satisfy the "necessary preconditions" established by the Supreme Court in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752 (1986) for challenging an at-large district voting scheme. Specifically, the District Court held that the Plaintiffs did not satisfy the *Gingles* requirement that they demonstrate that the minority group is "sufficiently large and geographically compact to constitute a minority in a single-member district." 107 S.Ct. at 2766. The Plaintiffs appealed to this Court. This Court affirmed the District Court's ruling on July 8, 1988 stating:

> This is precisely the kind of case where the Court thought invocation of the Voting Rights Act would be inappropriate. Appellants cannot show that the at-large system at issue here impairs their ability to elect candidates of their choice.

851 F.2d at 948. On September 21, 1988, this Court denied the Plaintiffs' motion for reconsideration and suggestion of rehearing *en banc* and issued its mandate.

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[1] The Plaintiffs filed a motion for a preliminary injunction on May 19, 1987. With that motion, they submitted an affidavit from their expert, Dr. Race Davies, identifying the proposed single-member district which they wished to have created.

On November 8, 1988, the voters of Springfield School District No. 186 approved a referendum under the Illinois School Code, Ill. Rev. Stat. Ch. 122 ¶9-22[2], to divide the district into seven single-member districts for Board elections.

B. This Action Is Not Moot

The Plaintiffs' claim that the November 8 referendum moots this case is erroneous. As explained by the Supreme Court, the purpose of declaring a case moot is that it:

> clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.

United States v. Munsingwear, 340 U.S. 36, 40, 95 L.Ed 2d 36, 41 (1950). It is extraordinary for a court of appeals to declare a case moot after it has entered a final judgment. Indeed, our research has disclosed no cases in which this Court has done so and the Plaintiffs have cited none. The Third Circuit has explained why it is highly unusual to declare a case moot after final judgment has been entered:

> It is not surprising that there are relatively few precedents dealing with the question whether a court of appeals possesses the authority to recall a mandate. Undoubtedly, litigants may have been deterred from

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[2] Ch. 122, ¶9-22 provides in pertinent part, as follows:

> A school board may, on its own motion, or shall, upon the petition of the lesser of 2,500 or 5% of the voters registered in the district, order submitted to the voters of the district at a regular school election or at the general election, the proposition for the election of board members by school board district rather than at large, and such proposition shall thereupon be certified by the secretary of the board for submission. If the proposition is approved by a majority of those voting on the proposition, the board shall divide the school district into 7 school board districts, each of which must be compact and contiguous and substantially equal in population to each other district.

The November 8th referendum was held as a result of a petition by the voters and not at the motion of the School Board.

> bringing 'recall' petitions by the weighty policy interests which undergird the salutary principle that there should be an end to a controversy in litigation: Not only should parties be entitled to rely on a judgment as the final settlement of their dispute, but courts must be able to clear their dockets of decided cases in order to permit them to hear new controversies which have arisen and require resolution by the judicial process. Put another way, parties should be afforded ample opportunity to litigate their claims, but once a final disposition is reached they should not expect that the good offices of the court will be available for a chance to press their claims anew.

American Iron and Steel Institute v. EPA, 560 F.2d 589 (3rd Cir. 1977) at 592. In *Armster v. United States District Court,* 806 F.2d 1347, 1353 (9th Cir. 1986), the Ninth Circuit declined to declare a case moot on the theory that the case had become moot because the defendants had voluntarily ceased the challenged activity after issuance of the court's decision (*Id.* at 1355). The court explained:

> When we rendered our decision in *Armster I,* all the required aspects of justiciability were present: ripeness, adverseness, etc.

Id. at 1354. Here, too, this Court rendered its decision at a time when all required aspects of justiciability were present.

The Plaintiffs base their claim of mootness on the contention that the referendum "accomplished the exact goal of plaintiffs' lawsuit." (Pl. Br. p. 5). This is incorrect. The lawsuit sought to have the at-large election system for school board members declared unlawful under the Voting Rights Act. Had the Plaintiffs succeeded, in order to cure the violation the Board would have had to adopt a redistricting plan which contained a majority black district. And, indeed, with their motion for a preliminary injunction, the Plaintiffs included a proposed district with a black total population majority which had been drawn by their expert. Although the District Court would have given the Board an opportunity to develop a redistricting plan, *Jones v. City of Lubbock,* 727 F.2d 364, 367 *reh. denied,* 730 F.2d 233 (5th Cir.

1984), *Major v. Treen,* 574 F. Supp. 325, 355 (E.D. La. 1983) (three judge panel), the District Court would have had ultimate approval of any plan submitted by the Board.

The Plaintiffs did not achieve that goal. As a result of the School Code referendum on November 8, the board must develop a redistricting plan but the prior decisions in this case establish that, on the basis of current demographic information, it is impossible to create a district with a majority black voting age population and the Board has no legal obligation to create a district with a majority black total population. The prior decisions in this case estop the Plaintiffs from bringing a Voting Rights Act based on current demographic information if the Board does not adopt a plan containing a district which is majority black in total population. In adopting a redistricting plan, the Board will obtain the input of all of its constituencies–parents, students, taxpayers and the citizens generally–and ensure that its plan is in accord with its obligations under applicable federal and state law; but it is speculative at best for the Plaintiffs to assume that the redistricting plan adopted by the Board will be the same as or similar to the one they hoped to achieve through this lawsuit.

The Plaintiffs have cited no cases which support their claim that this case is moot. The two cases they do cite, *In Re Ghandtchi,* 705 F.2d 1315 (11th Cir. 1983) and *Bumpus v. Clark,* 702 F.2d 826 (9th Cir. 1983), are far off the mark. In both cases events occurred while the case was on appeal which made it impossible for relief to be granted if the court of appeals reversed the district court. In *In Re Ghandtchi,* the issue on appeal was whether bail should have been granted pending an extradition hearing. While the appeal was pending, the extradition hearing was held and the individual was taken into custody pending extradition. Similarly, in *Bumpus,* the issue was whether a nursing home could be closed. Unbeknownst to the appellate court, the nursing home was closed while the case was on appeal and before the court issued its decision. The appellate court withdrew its opinion when it learned that fact, stating "We have no Article III jurisdiction over cases in which the district court has lost the power to grant relief if the appellate court were to reverse the judgment." 702 F.2d at 827. In contrast, this Court decided this case at a time when the district court had full power to grant

relief. And, indeed, notwithstanding the referendum, the District Court's power to order the requested remedy still exists if the Plaintiffs were to prevail before the U.S. Supreme Court and were able to prove a violation of the Voting Rights Act.

C. The Plaintiffs Are Not Prevailing Parties

The Plaintiffs have now lost this case before Judge Mills, a three-member panel of this Court and the entire bench of this Court with respect to their motion for reconsideration. Yet they ask this Court to declare that they are prevailing parties[3]. This attempt to rewrite history is contrary to the law as well as the facts. This Court has emphatically rejected the notion that a plaintiff who loses on the merits of his claim can be a prevailing party, stating:

> Here, we now know, the plaintiffs lost–unless it is possible to win by losing, a proposition we reject.

Palmer v. City of Chicago, 806 F.2d 1316, 1321 (7th Cir. 1986), *cert. denied,* ____ U.S. ____, 107 S.Ct. 2180 (1987). Similar to the Plaintiffs' claim here, in *Palmer,* the plaintiffs argued that they should be considered prevailing parties because, even though they had lost on the merits of their action challenging the constitutionality of the City of Chicago police department's alleged practice of concealing exculpatory materials contained in informal "street files", the department ceased to discard exculpatory materials after the suit was brought. The Seventh Circuit rejected this theory, explaining:

> this kind of benefit cannot support a fee award. 'If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense.' *Nadeau v. Helgemoe,* 581 F.2d 275, 281 (1st Cir. 1978).

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[3] The attorneys' fees provision of the Voting Rights Act, 42 U.S.C. §19731(e) is interpreted consistently with other civil rights act attorneys' fee provisions. *Riddle v. Nat'l Democratic Party,* 624 F.2d 539, 543 (5th Cir. 1980).

806 F.2d at 1322. The Court went on to explain:

> The civil rights attorneys' fees statute does not reward a plaintiff who brings an unmeritorious suit, merely because by some fortuity the suit brings about changes favorable to him . . . . The idea that litigation can be a weapon for obtaining benefits irrespective of the merits of the litigation underlies the torts of malicious prosecution and abuse of process . . . Because the suit was not frivolous, the city (meaning the taxpayers) must swallow the costs of the defense. It is not, however required to pay its opponents' costs. *The suit was not ineffectual or frivolous, but it failed, and people who bring losing suits must bear their own attorneys' fees.* (emphasis added)

806 F.2d at 1323. This case provides far less ground than *Palmer* to argue that the Plaintiffs achieved a favorable result through this litigation. In contrast to *Palmer,* the Plaintiffs here never obtained a preliminary injunction. And, as we discussed above, in contrast to *Palmer,* the Plaintiffs here did not obtain the relief they sought nor did the Defendant school district take any action as a result of the Plaintiff's lawsuit.

Palmer is dispositive of the Plaintiffs' motion. The District Court and this Court both determined that the Plaintiffs' claim was without merit. Even if one accepted the Plaintiffs' implausible claim (which we discuss *infra*) that their continuing losses in this case somehow prompted the voters of the District to adopt a single member districting scheme, the action of the voters was legally gratuitous and does not convert these losing Plaintiffs into winners.

The Plaintiffs have cited two cases in support of their argument that they should be deemed prevailing parties. Neither case is on point. In *Leroy v. City of Houston,* 831 F.2d 576 (5th Cir. 1987), *cert. denied,* ____ U.S. ____, 108 S.Ct. 1735 (1988)[4], a

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[4] The Plaintiffs cite to the District, not the Appellate Court opinion in *Leroy* (Pl. Br. p. 4) in spite of the fact that the Fifth Circuit disagreed "with significant portions of the District Court's legal analysis" and, accordingly, reversed and remanded. 831 F.2d at 578.

referendum was passed approving a mixed single district, at-large plan after the plaintiffs had lost before the District Court but while the appeal was still pending on that case. Moreover, after the plaintiffs lost the original suit, the United States Attorney General filed a preclearance suit as well as an amicus brief favoring the plaintiffs in the appeal. The court concluded that the plaintiffs were entitled to attorneys' fees on the theory that their lawsuit was a significant catalyst to the defendant's adoption of single-member districts.

Among the features that substantially distinguish *Leroy* from this case are two threshold differences which are fatal to Plaintiff's assertions. First, in contrast to *Leroy* where the Defendant City was the "catalyst" to changing the electoral process, the Defendant in this lawsuit, the Board of Education, did not initiate the referendum which passed on November 8. Under Section 9-22 of the Illinois School Code, Ill. Rev. Stat. Ch. 122 ¶9-22, that referendum was on the ballot because the requisite number of voters submitted a petition to have it there. The action of the voters and their motivation cannot be imputed to the defendant. Second, in *Leroy* the referendum was held *prior* to the Appellate Court's decision and the court specifically noted that the earlier litigation "although lost at trial by the plaintiffs, was widely expected to be reversed and remanded and would pose a continuing threat of judicial intervention in the City's districting." (831 F.2d at 581). Here, the referendum passed after this Court had affirmed that the Plaintiffs' action was without merit and denied their motion for a rehearing and when only the speculative possibility of a writ to the U.S. Supreme Court existed. The Plaintiffs in this case cannot be said to have "jumped on the redistricting train too early" as in *Leroy,* (831 F.2d at 580), the decision of this Court and the District Court establish that there was no train.

Similarly, in *Kirksey v. Danks,* 608 F.Supp. 1448 (D.Miss. 1985), the referendum the defendant City held to change its form of government came on the day the plaintiffs' case went to trial. The City Council had decided to call the referendum the day after the suit was filed. The plaintiffs produced newspaper articles to show that voters were aware of the pending lawsuit and thought that the court was likely to rule in the plaintiffs' favor.

Again, the distinctions between *Kirksey* and this case are great: 1) the Board in this case did not initiate the referendum; 2) the referendum occurred only after this Court had affirmed the District Court's judgment that this case was without merit.

The Plaintiffs have cited no Seventh Circuit cases in support of their motion, and the two cases discussed above are incompatible with *Palmer*. But even assuming that this Court were to adopt the "catalyst" theory applied in those cases, there is no basis for the Court to conclude that these Plaintiffs were catalysts for the November 8 referendum. The Plaintiffs' claim that they actually won this lawsuit in the face of three adverse decisions is based entirely on facts not in evidence before either the District Court or this Court.

Moreover, the chronology of events shows that the Plaintiffs' implausible claim that their lawsuit was a catalyst is, as a matter of law, meritless. The Plaintiffs lost in the District Court on August 13, 1987, almost a year and a quarter before the referendum. They lost in this Court on July 8, 1988–four months before the referendum. The petition for a rehearing was denied on September 21, 1988. To attribute the successful referendum to this lawsuit would require this Court to find on the basis of Plaintiffs' conclusory non-record assertions that the voters of District 186 were aware that the Plaintiffs might file for certiorari and that, notwithstanding the unanimity of the District Court and this Court, the voters concluded that there was a substantial possibility that the Supreme Court would not only accept certiorari but would reverse this Court. Such far-fetched theorizing stretches cause and effect beyond that breaking point.

In sum, this Court has emphatically held that losers are not winners. The Plaintiffs have not cited a single case in which a plaintiff who lost in the district court and the appellate court was deemed a prevailing party. Their effort to have this court declare them prevailing parties is contrary to the facts of this case, to logic and to established law.

D. The Defendants Are Entitled To Attorneys' Fees

We ask the Court to award the Board its costs of responding to this motion, including reasonable attorneys' fees, under

Appellate Rule 38 and the Voting Rights Act. 42 U.S.C. 1973 1(e).

This Court has recognized that attorneys' fees may be awarded to a defendant when a claim is groundless, "clearly foreclosed by precedent" or lacks sufficient basis in fact. *Hamer v. County of Lake,* 819 F.2d 1362, 1367 (7th Cir. 1987). Here, the Plaintiffs have filed a motion which has no reasonable basis in law or fact and which is directly contrary to the law of this Circuit. They have asked this Court to consider evidence which is not on the record. They have not cited any Seventh Circuit decisions and have ignored the Seventh Circuit case which is directly contrary to their motion. Not a single case from any other Circuit or the Supreme Court plausibly supports their motion.

In accord with *Hamer* and other decisions of this Court, *see, e.g., District No. 8 International Ass'n. of Machinists & Aerospace Workers v. Clearing,* 807 F.2d 618 (7th Cir. 1986); *Hamilton v. Daley,* 777 F.2d 1207 (7th Cir. 1985), it is the responsibility of Plaintiffs' counsel to know that their claim is foreclosed by clear precedent. Here they have either knowingly ignored that responsibility or have been sloppy in fulfilling it and fees and costs are appropriate.

Further, the Plaintiffs' reliance on the Fifth Circuit's decisions in *Leroy* and *Kirksey* is unreasonable in view of the fact that, in contrast to the defendants in *Leroy* and *Kirksey,* the Board of Education took no action whatsoever in response to the lawsuit. Moreover, in stark contrast to the chronology in *Leroy* and *Kirksey,* the referendum of November 8 was passed exactly four (4) months after this Court had rendered its decision and approximately six (6) weeks after it rejected the Plaintiffs' motion for rehearing. The likelihood that Plaintiffs might prevail before the U.S. Supreme Court is much too speculative to permit a conclusion that the voters of Springfield regarded their lawsuit as a "substantial factor and a significant catalyst in the passage of the referendum." The Plaintiffs' motion, in short, has no foundation in law, is contrary to clear precedent and is not supported by any record facts. The Board should be awarded its fees and costs.

CONCLUSION

Plaintiffs ask this Court to vacate its decision and award them attorneys' fees as the prevailing party on the far-fetched theory that their losing efforts before the District Court and this Court were a "substantial factor" in a referendum over which the school district had no control and which did not result in the relief that the Plaintiffs have sought since they filed this suit in January of 1987. This Court's sparingly-used power to recall a mandate should not be used in this case.

Accordingly, the Board of Education of Springfield School District 186 respectfully requests that the Plaintiffs' motion to recall mandate and dismiss this case as moot be denied and that the Board be awarded its reasonable costs, including attorneys' fees, of responding to this motion.

Respectfully submitted,

SPRINGFIELD SCHOOL
DISTRICT NO. 186

By: /s/ ANDREA R. WAINTROOB

One of Its Attorneys

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Dated: December 21, 1988

APPENDIX - C

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

February 13, 1989

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. _____

Hon. _____

FRANK MCNEIL, et al., individually and as representatives of a certified class,

Plaintiffs-Appellants,

No. 87-2478 **vs.**

SPRINGFIELD PARK DISTRICT and SPRINGFIELD SCHOOL DISTRICT NO. 186,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois Springfield Division

Nos. 87 C 3017 and 87 C 3016

Judge Richard Mills

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO RECALL MANDATE AND TO DISMISS THIS CAUSE AS MOOT" filed herein on December 8, 1988, by counsel for the plaintiffs-appellants.

2. "SPRINGFIELD PARK DISTRICT'S RESPONSE TO MOTION TO RECALL MANDATE AND TO DISMISS THIS CAUSE AS MOOT" filed herein on December 20, 1988, by counsel for the defendant-appellee, Springfield Park District.

3. "RESPONSE OF BOARD OF EDUCATION TO MOTION TO RECALL MANDATE AND DISMISS THIS CAUSE AS MOOT" filed herein on December 21, 1988, by counsel for the Springfield School District.

4. "RESPONSE OF SPRINGFIELD ELECTION COMMISSION TO MOTION TO RECALL MANDATE" filed herein on December 27, 1988, by counsel for the Springfield Election Commission.

On consideration thereof,

IT IS ORDERED that the MOTION TO RECALL MANDATE AND TO DISMISS THIS CAUSE AS MOOT is DENIED.

IT IS FURTHER ORDERED that Appellee Springfield School District No. 186's request for costs and attorneys' fees is DENIED.